

SEP 26 1979

MICHAEL R. NODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 79-138

DELTA COMMUNICATIONS CORPORATION,
v. *Petitioner,*

NATIONAL BROADCASTING COMPANY, INC., AMERICAN
BROADCASTING COMPANIES, INC., AND SOUTHERN TELE-
VISION CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

**BRIEF OF RESPONDENT SOUTHERN TELEVISION
CORPORATION IN OPPOSITION**

T. Y. MINNIECE
SINGLEY, MINNIECE,
NEVILLE & HAMILL
P.O. Box 5247
Meridian, Mississippi 39301

Of Counsel

WILLIAM SIMON
EDWARD P. HENNEBERRY
HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

WALTER W. EPPES, JR.
EPPES & SHANNON
4805 Poplar Springs Drive
Meridian, Mississippi 39301

*Attorneys for Respondent
Southern Television Corporation*

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	3
Statement of the Case	3
Argument	5
Conclusion	11

II

CITATIONS

Cases:

	Page
<i>Admiral Theater Corp. v. Douglas Theatre Co.</i> , 585 F.2d 877 (8th Cir. 1978)	8
<i>Bailey v. Hartford Fire Ins. Co.</i> , 565 F.2d 826 (2d Cir. 1977)	8
<i>British Airways Bd. v. Boeing Co.</i> , 585 F.2d 946 (9th Cir. 1978), <i>cert. den.</i> , 99 S.Ct. 1970 (1979) ..	8
<i>First National Bank of Arizona v. Cities Service Co.</i> , 391 U.S. 253 (1968)	5, 7, 9
<i>Harold Friedman, Inc. v. Kroger Co.</i> , 581 F.2d 1068 (3d Cir. 1978)	8
<i>McDonnell v. Michigan Chapter No. 10, et al.</i> , 587 F.2d 7 (6th Cir. 1978)	8
<i>Poller v. Columbia Broadcasting System, Inc.</i> , 368 U.S. 464 (1962)	5, 7
<i>Thyssen Plastik Anger KG v. Induplas, Inc.</i> , 576 F.2d 400 (1st Cir. 1978)	8
<i>United States v. Griffith</i> , 334 U.S. 100 (1948)	9
<i>United States v. Grinnell Corp.</i> , 384 U.S. 563 (1966)	9
<i>Woods Exploration & Producing Co. v. Aluminum Co. of America</i> , 438 F.2d 1286 (5th Cir. 1971), <i>cert. den.</i> , 404 U.S. 1047 (1972)	10

Statutes:

Sherman Act

§ 1 15 U.S.C. § 1	2, 3
§ 2, 15 U.S.C. § 2	2, 3, 9

IN THE Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-138

DELTA COMMUNICATIONS CORPORATION,
Petitioner,

v.

NATIONAL BROADCASTING COMPANY, INC., AMERICAN
BROADCASTING COMPANIES, INC., AND SOUTHERN TELE-
VISION CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT SOUTHERN TELEVISION
CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Southern District of Mississippi granting summary judgment on all federal antitrust claims in favor of respondents and dismissing the state claims and Communications Act claim is reported at 408 F. Supp. 1075 (Pet. App. A). The first opinion of the United States Court of Appeals for

the Fifth Circuit affirming *per curiam* the opinion and judgment of the District Court is reported at 579 F.2d 972 (Pet. App. C). The second *per curiam* opinion of the Court of Appeals on rehearing, affirming in part and vacating and remanding in part the District Court decision, is reported at 590 F.2d 100 (Pet. App. E).

JURISDICTION

The second order of the Court of Appeals affirming the granting of summary judgment by the District Court in favor of respondents on the federal antitrust claims was entered on February 21, 1979 (Pet. App. F). A timely Petition for Rehearing *en banc* was denied on May 7, 1979 (Pet. App. G). The petition for a writ of certiorari was filed on July 30, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

At issue are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2:

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. * * *

§ 2 Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, * * *

QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed the granting of summary judgment by the District Court in favor of respondents on petitioner's antitrust claims where, after three years of extensive discovery and after substantial evidence by respondents to refute petitioner's claims, petitioner failed to produce any significant probative facts from which any illegal monopoly or conspiracy could reasonably be inferred.

STATEMENT OF THE CASE

This litigation began as a collection suit by American Telephone and Telegraph Company ("AT&T") against Delta Communications Corp. ("Delta"), Petitioner, for payment of charges incurred in operating its television station. Delta counterclaimed against AT&T alleging violations of the Federal Communication Act. Much later, Delta filed a second counterclaim joining National Broadcasting Company, Inc. ("NBC"), American Broadcasting Company, Inc. ("ABC"), CBS, Inc. ("CBS") and Southern Television Corporation ("Southern") as counter-defendants and alleging violations of the antitrust laws. These charges included whether the respondents conspired to refuse to deal with Delta in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and whether Southern monopolized or conspired to monopolize the Meridian television market in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

The only fact that Delta could point to as evidence of any "conspiracy" was that each network refused to accept petitioner's proposed affiliation terms. In fact, the networks all provided Delta with programming, although on terms different from those sought by it, and each network reached a different agreement with Delta as compared with the others. The networks presented

substantial evidence demonstrating the sound and independent nature of their decisions about Delta's business. Delta presented no facts to refute respondents' evidence and it continues to rely solely upon the allegations in its counterclaim.

Similarly, in its claim that Southern had monopolized the Meridian television market, Delta completely failed to present *any* market data showing the relevant geographic and product markets affected by the claimed monopoly. Nor could it name a single instance where Southern used its alleged market position to harm Delta. Its entire claim consisted of five alleged acts by Southern which, Delta inferred, could be construed as exclusionary. Southern presented undisputed facts which refuted that inference.

Following submission to the Court of a written statement by Delta of its claims and alleged supporting evidence, the counter-defendants, respondents on this Petition, filed motions for summary judgment. After continually sifting every fact and speculative conjecture about those facts presented by Delta, and resolving every possible factual issue in Delta's favor, the District Court in an exhaustive opinion granted summary judgment for all respondents. (Pet. App. A, B).

On appeal, the Fifth Circuit carefully reviewed the entire record and, adopting the District Court's opinion, affirmed *per curiam* the granting of summary judgment for respondents (Pet. App. C, D). On petition for rehearing, the Fifth Circuit again scrutinized the summary judgment standard applied by the District Court. For a second time, the Fifth Circuit affirmed *per curiam* that the District Court had applied the proper rule of summary judgment in disposing of the antitrust claims presented here (Pet. App. E, F). It vacated and re-

manded to the trial court, pending administrative proceedings, the dismissal of Delta's original counterclaim against AT&T under the Communications Act. This claim does not involve Southern or any of the other respondents here and is not included for review in the present petition for certiorari.

ARGUMENT

I. SUMMARY JUDGMENT WAS APPROPRIATE

A. The District Court Applied The Correct Standard of Summary Judgment

This petition presents no issue warranting review by this Court. Summary judgment is appropriate in an antitrust case when there are no material factual disputes and when one party is entitled to judgment as a matter of law. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968). Contrary to Delta's allegations, the actions of the District Court and the Fifth Circuit in granting and affirming summary judgment on the antitrust issues in this case fully comply with the provisions of F.R. Civ. P. 56 and the decisions of this Court.

Delta errs when it now characterizes the District Court's decision as holding that summary judgment may be based upon "a choice of the most *probable* of conflicting inferences presented by the record" (Pet. 10, emphasis in original). At the time of respondents' motion for summary judgment, and after three years of extensive discovery, the record revealed no disputed material facts. The District Court meticulously and repeatedly examined the record from every possible angle

and in a light most favorable to Delta, including the construction of possible legal theories for it:

In addition to giving Delta the advantage of structuring for it the best possible legal theories, this court, as required in summary judgment actions, has resolved every issue of disputed material fact in favor of Delta and has drawn every reasonable inference from those facts in Delta's favor on each of the theories constructed (Pet. App. A 3-4).

The District Court then concluded that the record not only completely failed to provide any factual or logical support for Delta's inference of an antitrust conspiracy, but also that it provided overwhelming support for the networks' explanations that their individual refusals to accept Delta's business proposals were solely the result of sound and independent decisions (Pet. App. A 2-4, 18-19, 23-26, 50). Similarly, the Court ruled that the record contained absolutely no evidence to support Delta's inference that Southern monopolized the Meridian market, and that in fact it supported Southern's explanations of its conduct. (Pet. App. A 69, 71, 72, 74). Twice the Fifth Circuit reviewed the evidence and came to the same conclusions that the *record* supports only *one* inference: that no antitrust conspiracy or monopolization existed (Pet. App. C, E). As the Fifth Circuit expressly ruled, the District Court "... resolved every issue of disputed material fact in favor of Delta and has drawn every reasonable inference from these facts in Delta's favor on each of the theories constructed" (Pet. App. E 4, n.1). In light of all the uncontroverted evidence, Delta's inferences and claims were and are clearly implausible and unreasonable.

As articulated by the Fifth Circuit opinion in this case, on a summary judgment motion the District Court is required to identify the undisputed facts in a case and, if they are insufficient to decide the legal issues, to

weigh every possible inference built upon those facts against an abstract standard of reasonableness. Rejecting inferences which are unreasonable in light of all the evidence before it, the Court must then evaluate the strength of the summary judgment motion (Pet. App. E 3). Although Delta apparently accepts this approach to summary judgment, its Petition argues in essence that the Court must give credence to all of a plaintiff's inferences—whether or not rebutted by the undisputed evidence. In Delta's view, summary judgment may be resisted solely on the basis of asserted hypothetical inferences from the facts in a case, regardless of the existence of undisputed facts in the record which rebut those inferences or make them patently unreasonable.

Decisions of this Court and all other Circuit Courts of Appeal uniformly require more than mere allegations or hypothetical inferences to resist a motion for summary judgment. Delta mistakenly relies on this Court's opinion in *Poller, supra*, to support its contentions to the contrary. Summary judgment was not appropriate in *Poller* because the District Court there, unlike the Court in this case, failed to review every possible inference from the undisputed facts for its reasonableness, and to decide the summary judgment motion on the basis of all reasonable inferences. The record in that case substantiated as reasonable an inference that respondents' refusals to deal with petitioner were contrary to their economic self-interests. This Court's opinion in *Cities Services Co., supra*, establishes the propriety of summary judgment when hypothetical inferences are unsupported by the record. The evidence in *Cities Services* not only did not sustain petitioner's hypothetical inferences of conspiratorial motive, but, as in this case, it substantiated respondents' explanation of their actions.

Cases from other Circuits relied upon by Delta to support its argument that all inferences, no matter how

unreasonable, must be assumed true on a summary judgment motion actually demonstrate the preposterousness of this position. Thus, in a complex evidentiary pattern very similar to this one, summary judgment was upheld in *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068 (3d Cir. 1978), where the defendants presented uncontradicted evidence which refuted plaintiff's inferences of an antitrust violation. The Third Circuit emphasized that in those circumstances a plaintiff cannot continue to rely simply upon mere allegations to resist summary judgment, but must come forth within "probative evidence" of its own. *Id.* at 1080. Similarly, in *British Airways Bd. v. Boeing Co.*, 585 F.2d 946 (9th Cir. 1978), *cert. den.*, 99 S.Ct. 1790 (1979), Boeing moved for summary judgment after presenting evidence that the accident which formed the basis of the lawsuit was not caused by defective parts. To counter this evidence, British Airways presented testimony consisting solely of "supposition, speculation, and conclusory argument of counsel." *Id.* at 954. The Ninth Circuit upheld summary judgment because plaintiff relied solely upon the allegations of its complaint and failed to introduce "specific facts" to resist the summary judgment motion.¹

Petitioner's view of summary judgment would allow a party to go to trial on the basis of bald inferences and despite the presentation of undisputed facts rebutting those inferences. This view would totally abrogate the

¹ Other cases cited by petitioner also apply the District Court's and Fifth Circuit's standard of summary judgment. In *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877 (8th Cir. 1978), summary judgment was affirmed because the record substantiated only one party's interpretation of the facts. In the three cases relied upon by petitioner where summary judgment was declared improper, solid factual evidence existed to support each party's interpretation of the facts. *Thyssen Plastik Anger KG v. Induplas, Inc.*, 576 F.2d 400 (1st Cir. 1978); *Bailey v. Hartford Fire Ins. Co.*, 565 F.2d 826 (2d Cir. 1977); *McDonnell v. Michigan Chapter No. 10, et al.*, 587 F.2d 7 (6th Cir. 1978).

current law of summary judgment. Further, Delta's argument directly contradicts the views of this Court on summary judgment. In *Cities Services*, this Court specifically declined "to read [summary judgment] out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaint." 391 U.S., at 289-90. There is no reason in the present case to depart from that ruling.

B. Petitioner Completely Misreads the District Court's Holding on Its Monopolization Claim Against Southern

Delta alleged that Southern monopolized the Meridian television market in violation of Section 2 of the Sherman Act. It pointed to five "specific acts" of alleged predatory or willful conduct by Southern by which this monopoly was allegedly maintained. Delta urges review of the District Court's dismissal of this claim because of the Court's supposed erroneous requirement that Delta prove that Southern's conduct amounted to "specific predatory intent toward Delta" (Pet. 22).

Nowhere in the District Court opinion is there any requirement of specific predatory intent to establish a claim of monopolization. Rather, the District Court correctly required Delta to demonstrate that the five acts complained of were undertaken in furtherance of Southern's *assumed* monopoly position (Pet. App. A 65).² See, e.g., *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *United States v. Griffith*, 334 U.S. 100,

² Petitioner's statement that both the District Court and the Court of Appeals found that Southern "held the dominant monopoly power in the Meridian television market" is misleading (Pet. 22). In fact, the District Court ruled that Southern did *not* have "sufficient economic market domination" in the broadcasting of network programs to make it subject to scrutiny under Section 2 of the Sherman Act. However, the Court assumed that Southern had such power for purposes of summary judgment (Pet. App. A 63-64).

107 (1948); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1304 (5th Cir. 1971), *cert. den.*, 404 U.S. 1047 (1972). The Court concluded that "... Delta was unable to show a single instance where Southern used its alleged market domination to harm Delta" (Pet. App. A 64). In fact, the District Court opinion continually noted both the lack of factual evidence presented by Delta to sustain its monopolization theory and Delta's complete failure to contradict in any way the proof of rational business justification offered in evidence by Southern for its supposed "predatory" conduct (*Id.* at 64, 71, 72, 73, 75).³ After an exhaustive review the evidence and the claims, the Fifth Circuit agreed completely with the District Court's ruling (Pet. App. C, E).

The facts forming the basis for the monopolization claim remain undisputed by the parties. The District Court thoroughly reviewed all the evidence presented and was simply unable to find "any facts or reasonable inferences from facts which would support any claim of anticompetitive action on the part of Southern" (Pet. App. A 80). No material facts being in dispute, evidence of exclusionary action being non-existent, and evidence being replete that Southern acted solely on the basis of sound business practices, Delta's claims of monopolization necessarily cannot withstand summary judgment.

³ Illustrative of the so-called "predatory" acts alleged by Delta is the fact that Southern replaced one hour of cancelled NBC programming with 0.8 hours of ABC programming. Since that still left Southern with *less* ABC programming than it had prior to the existence of Delta, the Court had no problem in holding that this did not constitute proof of exclusionary conduct by Southern in furtherance of an alleged monopoly, but simply reflected the application of sound business sense to scheduling (Pet. App. A 69, 71). Similarly, Delta's claim that efforts by Southern to correct an admitted error in an audience survey was found by the District Court to be so "... untenable that the claim approaches the frivolous" (*Id.* at 79).

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

T. Y. MINNIECE
SINGLEY, MINNIECE,
NEVILLE & HAMILL
P.O. Box 5247
Meridian, Mississippi 39301

Of Counsel

WILLIAM SIMON
EDWARD P. HENNEBERRY
HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

WALTER W. EPPES, JR.
EPPES & SHANNON
4805 Poplar Springs Drive
Meridian, Mississippi 39301

*Attorneys for Respondent
Southern Television Corporation*

Dated: September 26, 1979